Supreme Court, U.S.
FILED

No. 051188 FEB 15 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MORETON ROLLESTON, JR. LIVING TRUST,

Petitioner,

v.

ESTATE OF REBECCA WIGHT CHERRY SIMS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

MORETON ROLLESTON, JR.
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QUESTIONS PRESENTED FOR REVIEW

No. One

Whether the Sheriff of Fulton County, in Atlanta, Georgia illegally evicted the Trustee of the Moreton Rolleston, Jr. Living Trust (appellant) in violation of the eviction laws of State of Georgia, namely, O.C.G.A. 44-11-30 and 44-11-32.

No. Two

Whether the eviction of the Trust and of Rolleston, the Trustee of the appellant, was illegal and violated the Fourth Amendment of the U.S. Constitution.

OPINION BELOW

"Upon consideration of the petition for writ of certiorari as amended, the same is hereby denied. Petitioner's request for injunctive relief is also denied. It is further ordered that upon receipt of the remittitur, the trial court shall assess against the petitioner and in favor of the respondent, a penalty for frivolous appeal in the amount of $2500, to be paid within 30 days of the trial court's order."

In Georgia Supreme Court Case No. SO5A 1899 and SO5A 1900. Subject of certiorari was the case in the Georgia Court of Appeals A05A 1645.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides in relevant part: "No person shall be . . . deprived of . . . property without due process of law."

REASONS FOR GRANTING THE PETITION

Question No. One

The defendant Estate (hereinafter Estate) asked the Sheriff of Fulton County, Ga. to evict the plaintiff Trust (hereinafter Trust) from the house and 18 acres of land

which was the home of Moreton Rolleston, Jr. (hereinafter Rolleston home).

The eviction was illegal because the Sheriff and the Cherry Estate did not comply with OCGA 44-11-30 because (1) the Cherry Estate did not present an affidavit demanding possession and (2) Rolleston did give the Sheriff Banner his affidavit in which he claimed legal right to possession of Rolleston's home (address of which is 2035 Garraux Road, N.W., Atlanta, Georgia 30327).

The Cherry Estate did not comply with the law. Rolleston did comply. Rolleston has been entitled to possession of 2035 Garraux since November 1, 2003.

The applicable statute which Cherry and Sheriff Banner violated reads as follows:

> "OCGA 44-11-30. Manner of ejecting intruders; affidavit, ejection by sheriff; counter affidavit."
>
> When any person, either by himself, his agent, or his attorney in fact, shall take and subscribe an affidavit in writing before any officer authorized to administer an oath setting forth that he claims, in good faith, the right of possession to the described land or tenement and that such land or tenement is in the hands of another named person who does not in good faith claim a right to such possession and yet refuses to abandon the same, it shall be the duty of the sheriff of the county where the land or tenement is located, upon receiving such affidavit, to exhibit such affidavit to the person described as being in possession of such land or tenement at the earliest possible date and to turn such person out of possession unless the person in possession tenders to the sheriff a counter affidavit stating that he

claims in good faith, a legal right to the possession of the land or tenement. (Ga. L 1853-54, p. 52, § 1; Code 1863, § 3979; Code 1868, § 4000, Code 1873, § 4072; Code 1882, § 4072; Civil Code 1895, § 4808; Civil Code 1910, § 5380; Code 1933, § 105-1501.)"

"44-11-32. Procedure on submission of counter affidavit; trial.

If the party in possession submits a counter affidavit as provided in Code Section 44-11-30, the sheriff shall not turn him out of possession but shall leave both parties in their respective positions. In such an event, the sheriff shall return both affidavits to the office of the clerk of the superior court of the county in which the land is located for a trial of the issue before a jury in accordance with the laws of this state. (Ga. L 1853-54, p. 52, § 1; Code 1863, § 3981; Code 1868, § 4002, Code 1873, § 4074; Code 1882, § 4074; Civil Code 1895, § 4810; Civil Code 1910, § 5382; Code 1933, § 105-1503.)"

The Trustee is Moreton Rolleston, Jr.

The site of the eviction was the home of Moreton Rolleston, Jr. and had been for 33 years. Address was 2035 Garraux Road, N.W., Atlanta, Ga. 30327. Rolleston's home was on 18 acres of land.

Question No. Two

The eviction of the Trust and of Rolleston, the Trustee of the appellant, was illegal and violated the Fourth Amendment of the U.S. Constitution.

In case No. 04-1067 STATE OF GEORGIA, PETITIONER VS. SCOTT FITZ RANDOLPH, the Supreme Court of the United States issued an opinion which supports the position of the Trust in the instant case because the Trustee (Rolleston) tendered to the Fulton County Sheriff an affidavit which stated that he claimed in good faith a legal right to the possession of Rolleston's home as described herein. A copy of said affidavit is attached as Exhibit "A" hereto.

Sheriff Banner acknowledged receipt of Rolleston's affidavit in Exhibit "B" hereto, dated November 1, 2003.

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EXHIBIT "A"

AFFIDAVIT OF MORETON ROLLESTON, JR.

Moreton Rolleston, Jr., who having personally appeared before the undersigned officer, duly authorized by law to administer oaths, having been first duly sworn according to law, deposes and states the following:

1.

I voluntarily and freely make this affidavit of my own personal knowledge.

2.

I am over the age of 21, am suffering from no legal disability, and am competent and authorized to make this affidavit and testify to the statements and facts contained herein.

3.

The information contained in this affidavit was obtained from my own personal knowledge.

4.

All the facts set forth herein are true and correct.

5.

In accordance with Official Code of Georgia 44-11-30, I, as Trustee of the Moreton Rolleston, Jr. Living Trust, state that I, in good faith, claim a legal right to the possession of property known as 2035 Garraux Road, N.W.,

Atlanta, Georgia 30327 and all land surrounding said house known as 2035 Garraux Road, said surrounding land consisting of approximately 18 acres. I have lived in this house since May 1962. In 1995 I transferred this house and all land to Moreton Rolleston, Jr. Living Trust by deed which is recorded. I am the only Trustee of this trust. I am in possession of the house and surrounding 18 acres.

This 15th day of October, 2003.

/s/ Moreton Rolleston
Moreton Rolleston, Jr.

Sworn to and subscribed before me
on this 15th day of October, 2003.

/s/ Ann S. Cagle
Notary Public

[Stamp]

Notary Public, Cobb County, Georgia.
My Commission Expires Jan. 29, 2004

EXHIBIT "B"

~~The undersigned is an officer of the Sheriff Department of Fulton County, Georgia and has served Moreton Rolleston, Jr. with an affidavit of~~ _____ ~~claiming possession of 2035 Garraux Road, N.W., Atlanta, Georgia~~. I hereby acknowledge receipt of the foregoing affidavit by Rolleston ~~immediately after I served the affidavit on Rolleston~~.

This 1 day of ~~October~~ Nov., 2003.

_____

Sheriff, badge No. _____